THE COLLECTOR *v.* DAY.

It is not competent for Congress under the Constitution of the United States to impose a tax upon the salary of a judicial officer of a State.

ERROR to the Circuit Court for the District of Massachusetts; the case being thus:

The Constitution of the United States ordains that

"Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States."

And an amendment to it, that

"The powers not delegated to the United States are reserved to the States respectively, or to the people."

With these provisions in force as fundamental law, Congress by certain statutes passed in 1864, '5, '6, and '7,* enacted that

"There shall be levied, collected, and paid annually upon the *gains, profits*, and *income* of every person residing in the United States, . . . whether derived from any kind of property, rents, interest, dividends, or salaries, or from any *profession*, trade, *employment or vocation*, carried on in the United States or elsewhere, or from any other source whatever, a tax of 5 *per centum* on the amount so derived, over $1000."

Under these statutes, one Buffington, collector of the internal revenue of the United States for the district, assessed the sum of $61.50 upon the salary, in the years 1866 and 1867, of J. M. Day, as judge of the Court of Probate and

* Statutes of the 30th of June, 1864, c. 173, § 116, 13 Stat. at Large, 281; of the 3d of March, 1865, c. 78, § 1; Ib. 479; of the 13th of July, 1866, c. 184, § 9; 14 Id. 137; and of the 2d of March, 1867, c. 169, § 13; Ib. 477.

Insolvency for the County of Barnstable, State of Massachusetts. The salary was fixed by law, and payable out of the treasury of the State. Day paid the tax under protest, and brought the action below to recover it.

The case was submitted to the court below on an agreed statement of facts, upon which judgment was rendered for the plaintiff. The defendant brought the case here for review; the question being, of course, whether the United States can lawfully impose a tax upon the income of an individual derived from a salary paid him by a State as a judicial officer of that State.

Mr. Akerman, Attorney-General, and Mr. John C. Ropes (with a brief of Mr. Ropes), for the collector, plaintiff in error:

In the exercise of its *granted* powers, the Federal government is supreme. Under the general power of taxation, every man and every thing throughout the country (exports excepted) are subject to taxation in the discretion of Congress, provided that the power be exercised for the purposes declared in the Constitution, and not for unauthorized purposes, and that the conditions of its exercise, prescribed in the Constitution, uniformity, &c., be complied with.

1. What was granted to the Federal government was the power of taxation *for certain purposes* (the common debts, the common defence, the general welfare), for none of which were the particular States bound any longer to provide. These burdens were now thrown on the general government, and the resources on which each State had been able to draw to meet the requisitions of the Congress of the Confederation for money to defray these burdens, were naturally placed at the direct disposal of the United States. The idea was, not to exempt certain classes of persons or objects from their share of the public burdens; to exempt a judge of probate, for instance, from his share of the tax necessary to meet the interest on the public debt, or support the army and navy; but merely to lay these public duties on the general government instead of the States. With the duties went also the power to discharge them; the general government

took by the Constitution an exclusive right to tax imports, and shared with the States the rights of taxation retained by them. Nobody was to be exempted; nobody was to be taxed any more than he had been before. It was simply a change of the sovereign charged with the public duty, and who was therefore clothed with the power to discharge that duty. When the United States repays to a particular State money expended by that State for the public welfare, and originally raised by State taxation from the incomes of State officers among others, nobody imagines that the State officers can claim their share of this tax from the State. Why should they not therefore pay it in the first instance to the United States?

So a section of the statute now under consideration, taxing the issues of State banks so excessively as to drive their notes out of circulation, has been held constitutional.* And the court were unanimous in the opinion, that Congress can tax the *property* of the banks and of all other corporate bodies of a State, the same as that of individuals.

It will not be pretended, on the other side, that the income of an individual derived exclusively from State stock would be exempted from this income tax. Yet the courts have recognized a strong analogy between the taxation of the *issues* of a bank, of the *office* of an officer, and of *stock as such:* is there not a similar analogy between *income* derived from the *business* of the bank, from the *dividends* of the stock, and from the *salary* of the office? If one is taxable, are not they all?

Again: who are to be thus exempted from bearing all direct share in the maintenance of the National government? Is the exemption to be confined to judges of State courts? or are *all* officers of the State and municipal governments to be equally exempt? If not, why not?

Further: suppose the defendant in error had been drafted into the army under a general conscription law, would his office have saved him? If it would, how far is this exemp-

* Veazie Bank *v.* Fenno, 8 Wallace, 533.

tion to extend? Are justices of the peace and aldermen exempt? And is it to be supposed that the number of persons exempt in a particular State from military duty depends on the laws of that State; that the fact of a man's holding a commission as a State judge exempts him from serving in the army of the United States in time of war?

It will doubtless be urged that within the sphere of their jurisdiction, the States are as independent of the Federal government, as the government, within its sphere, is independent of the States; and that a government whose officers are taxed cannot be considered independent.

But this independence of the States is confined to a certain sphere by the terms of the objection. That is to say, it is an independence consistent with the supreme authority of another government over its citizens, and its property, for certain of the most important purposes of government. Can that State be in any sense independent, all of whose citizens may, against their will, be drafted into the army; and all of whose citizens, except its officers (to adopt the defendant's theory), may be at any time deprived by another government of a percentage of their income to defray the expense of a war, to which, perhaps, they are all opposed? Is it any more an abridgment of the independence and sovereignty of a State to tax the agents of the people, than to tax the people themselves?

None of these abstract theories are pertinent to the case. The people, acting through the States, have given to the general government certain duties to perform, and a general power of taxation to enable it to perform those duties. Whoever and whatever would have been liable for such taxation had the States been independent, and retained these charges in their own hands, are made liable for the same taxation from the new government. The sphere of the latter was limited by express provisions; by restricting the objects for which taxes could be levied; by defining the mode of levying them so as to insure uniformity throughout the country; by excluding exports from all liability to taxation; and, in general, by conferring upon the general gov-

ernment *a few only* of the powers possessed by a nation. But when the general government acts within its prescribed limits and for its prescribed purposes, its power overrides everything in the country, and there is no limit to its reach. It is of no avail to plead that a man is a State officer, or that his income was paid him by the State; if the government need him or his money for legitimate purposes, they can take both in the way pointed out by the Constitution; exactly as the government of his own State could have done had it retained the powers which it has expressly granted to the United States.

Do we then assert for the general government that it can tax the State governments out of existence? By no means: no more than it can tax the people out of existence. The United States taxes must be uniform; they can be levied only for certain definite objects; they must be conformed to the general principles and practice of taxation. Whatever injury they do to the State governments is an *incidental* injury. The taxes would have to be levied by the States themselves if they had not granted the power to do so to the United States. No more money is exacted of the citizen in one case than in the other. The power of the general government is only to be exercised for certain purposes, and then only under certain conditions. These provisions were thought adequate to guard against encroachment on the part of the Federal government in the matter of taxation; and as long as the Federal government levies its taxes with the *uniformity* required by the Constitution, there is and can be no danger to the State governments, for the reason that the officer can be taxed no more than the citizen,—the burden falls on all alike. Whatever burden the people of the United States are willing to impose on themselves can be borne by the State officers in common with the rest of the people, without any injury to the State *governments*.

The difficulty about this subject has arisen from the mistake of applying the language used by this court, when the propriety of subjecting the powers and property of the United States to the varying taxation of the different States, was in

question, to a case where the United States proposes to impose its uniform taxes on the persons and property in all the States, over which and over whom it holds, by virtue of an express grant, a concurrent power of taxation with the States themselves.

It has been decided that a State cannot tax the means used by the general government to execute its granted powers;* because, in the first place, the Constitution expressly provided that in the exercise of these powers, the general government should be supreme; because, in the next place, exemption from State taxation was implied in the very grant itself; and also, because it would be practically impossible to carry out the powers granted to the general government if their execution was to be hindered by the taxation which any State might see fit to impose on the means used to carry them out. So far as this question was concerned, it was as if the several States had granted these powers to a foreign government; had guaranteed that in the exercise of these powers the laws of that government should be supreme; and had then undertaken to tax the banks, stock, and the other means used to carry out these powers. And had the foreign government, in its turn, granted similar powers to the several States, and had then undertaken to tax the agents and means used by the State to carry out these powers, the same reasoning would exempt the officers and agencies of the State. But this is not our case. There never was any grant of powers by the United States to the several States. Consequently there is no parallel. The States reserved to themselves whatever rights of government they did not grant to the United States; they granted to the United States a concurrent right with themselves of taxation for certain objects; and if in the exercise of that right the United States taxes officers and private citizens alike, it does so by virtue of that grant of concurrent taxation.

All that we contend for is the common liability of State officers for their *property*. If indeed Congress should impose

* See *infra*, 121.

a *license tax* on all State officers—should require a man to pay fifty dollars, for instance, in order to discharge the duties of a judge of probate, or State treasurers to pay to the United States 5 per cent. of all moneys in their hands—the constitutionality of the enactments might well be doubted. It might be tested by the inquiry whether they were passed to carry out *the purposes* for which the right of taxation was given to Congress; whether, in fact, their purpose was not manifestly to injure the State governments.

But taxation of the *incomes* of State officers derived from their salaries is exactly that taxation which the State makes. Therefore, the right to do the same for certain objects was granted to the United States under the general power of *concurrent* taxation.

It will be said that the tax in this case is in reality a tax on the revenues of the State, which are withdrawn from the taxing power of Congress. But inasmuch as a tax in all respects similar is imposed on the State officers by the State itself, we have, if this proposition be true, the singular spectacle of a State taxing its own revenues. The same observation may be made regarding the operation of the income tax on the salaries of United States officers. The truth is, that in no proper sense is a tax upon income derived from a salary paid by a State or by the United States a tax upon the State treasury, or upon that of the United States.

A similar consideration is an answer to the suggestion that this income tax is a tax upon the State officers, as such. It is no more so than the like tax imposed by the State itself. The propriety of making all officers bear their proportion of the public burdens has commended this course alike to the States and the general government; but shall we say that the State taxes the *office* of a judge of probate? Or that the United States taxes the *office* of a major-general? Is it not clear that when the salary has been paid, it belongs to the officer who receives it, and that he must contribute out of his substance as well to the support of the army and navy of his country as of the schools and poor-houses of his State? Is there any subjugation of State authority here?

2. But adopt the general theory of the other side, that this case is controlled by the cases in which the right of the States to tax the agencies of the Federal government has been denied, we submit, that according to these cases the tax in question can be sustained.

The cases referred to are cases of attempted direct interference by the States with the means used by the general government to carry out its powers; the difference between them and the present case is striking, and material.

In *McCulloch* v. *Maryland*,* the leading case, the State of Maryland undertook to tax the issues of notes of a bank of the United States. The court held that this was a tax on the means used by the general government to execute one of their powers, and that the sovereignty of the State did not extend to those means. But the court said that the real estate of the bank, and the property of the citizens of the State in the bank, which are subject to the sovereignty of the State, were liable to State taxation.

In *Weston* v. *Charleston*,† the city of Charleston undertook to tax "*six and seven per cent. stock* of the United States." The court said that this was a tax upon the *contract* subsisting between the United States and the individual—a tax on the *power to borrow money* on the credit of the United States, which was not within the sovereignty of the State.

In *Dobbins* v. *The Commissioners of Erie County*,‡ the case stated shows that the plaintiff had been rated and assessed with county taxes "as an officer of the United States, *for his office, as such*, valued at $500." And the statute of Pennsylvania authorized an assessment upon "*all offices* and posts of profit." The court held that the statute could not comprehend the *offices* of the United States, and that is *the point adjudged*. The dicta and reasoning in the opinion, or of the judge who delivered it, are of no authority. The case fell precisely within the principles laid down in *McCulloch* v. *Maryland*, and followed in *Weston* v. *Charleston;* namely, that a State cannot tax the *means* used by the government of the

* 4 Wheaton, 316. † 2 Peters, 449. ‡ 16 Peters, 435.

Union to execute its *powers*. The court also held that no State could diminish by taxation the amount of the compensation paid by the United States to their officers; but that this principle could not serve also to exempt State officers from taxation by the United States, is more than intimated in the following sentence from the opinion of the court:

"The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve; without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, *or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation in common with itself, for the benefit of both.*"

If now we apply to the tax in question the test laid down by Chief Justice Marshall in *McCulloch* v. *Maryland*—if we measure the power of taxation by the extent of sovereignty—we find a distinct grant from the States to the United States of sovereignty, and of the sovereign power of taxation over all the objects of taxation (except exports)—exclusive as regards imports—concurrent with the States as regards everything else. We find this defendant's income derived from his salary as judge of probate, regarded as a proper object of taxation by the State, and taxed as other property; the inference is unavoidable that it is equally taxable by the United States.

But if it be argued that the sovereignty of the States requires that the same exemptions should be made from the taxation of the United States, which have been made from the taxation of the States in favor of the means used by the general government to execute its sovereign powers—we maintain—

a. That it has never yet been held that a State cannot tax the income of an officer of the Federal government *as property.**

b. But the conclusive answer to this argument is, that this

* See Melcher v. Boston, 9 Metcalf, 73, 77.

court has already decided otherwise in *Veazie Bank* v. *Fenno*. We refer specially to this case. It was a case almost parallel to *McCulloch* v. *Maryland* — where the question was, whether a tax of 10 per cent. on the issues of a State bank was valid; and the court held it was valid. It held, in *Veazie Bank* v. *Fenno*, by a majority of the court, that the United States could lawfully tax the operations of a State bank, even with the purpose of driving its issues of notes out of circulation.

But to this point it is not necessary for us to go in the case before us. All the court were agreed that the property of the banks, and of all other incorporated institutions of the States, could be taxed by the United States the same as that of individuals; that is to say, that property acquired under a grant from a State, in the exercise of one of its sovereign powers, is subject to that uniform taxation which the Federal government can impose upon all the property in the country. Now all that we contend for in this case is, that property, paid to an individual as an officer of a State by a State, in the exercise of its constitutional power to have such officers, is subject to the same taxation from the Federal government.

Mr. Dwight Foster, contra.

Mr. Justice NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In *Dobbins* v. *The Commissioners of Erie County*,* it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be inter-

* 16 Peters, 435.

fered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of *McCulloch* v. *Maryland*,* and *Weston* v. *Charleston*,† were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch* v. *Maryland*.‡ "If the States," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the States." Again,§ "That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied." And, in *Weston* v. *The City of Charleston*, he observes:‖ "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe."

It is conceded in the case of *McCulloch* v. *Maryland*, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the

* 4 Wheaton, 316. † 2 Peters, 449. ‡ 4 Wheaton, 432.
§ Ib. 427. ‖ 2 Peters, 466.

States against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins* v. *The Commissioners of Erie*, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

Opinion of the court.

The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County* v. *Oregon*.* "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved." Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative

* 7 Wallace, 76.

body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent

power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins* v. *The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank* v. *Fenno*,* in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch* v. *Maryland*, namely, "That the power to tax involves the power to destroy."

* 8 Wallace, 533.

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY, dissenting.

I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of

a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

TRANSPORTATION COMPANY v. DOWNER.

1. The terms "dangers of lake navigation" include all the ordinary perils which attend navigation on the lakes, and among others, that which arises from shallowness of the waters at the entrance of harbors formed from them.
2. When a defendant—a transportation company—shows that a loss of goods, which it had contracted to carry from one port to another, was occasioned by a danger of lake navigation, from losses by which it had exempted itself by its bill of lading, the plaintiff may show that the danger and consequent loss might have been avoided by the exercise of proper care and skill on the part of the defendant; in which case the defendant will be liable notwithstanding the exemption in the bill of lading. The burden of establishing the absence of such care and skill on the part of the defendant rests with the plaintiff.